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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

CRYSTAL M. FERGUSON, *et al.*,

Petitioners,

—v.—

THE CITY OF CHARLESTON, SOUTH CAROLINA, *et al.*,

Respondents.

ON PETITION FOR A *WRIT OF CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR *WRIT OF CERTIORARI*

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QUESTION PRESENTED

1. Whether the "special needs" exception to the Fourth Amendment's warrant and probable cause requirements was properly applied to a discretionary drug testing program targeting hospital patients that was created and implemented with police and prosecutors primarily for law enforcement purposes?

LIST OF PARTIES

The Petitioners are Crystal M. Ferguson, Theresa Joseph, Darlene M. Nicholson, Paula S. Hale, Ellen L. Knight, Patricia R. Williams, Lori Griffin, Pamela Pear, Sandra Powell, and Laverne Singleton.

The Respondents are the City of Charleston, South Carolina, Dr. Harrison L. Peoples, Dr. Thomas C. Rowland, Jr., Dr. Stanley C. Baker, Jr., Dr. Charles B. Hanna, Dr. Cotesworth P Fishburne, Dr. E. Conyers O'Bryan, Melvyn Berlinsky, Patricia T. Smith, M.J. Cooper, Herbert C. Granger, Robert C. Lake, Jr., Phillip D. Sasser, Claudia W. Peoples, and Dr. Carroll V. Bing, Jr., in their official capacities as Trustees of the Medical University of South Carolina, Reuben Greenberg, Charles Molony Condon, David Schwacke, Shirley Brown, R.N., Edgar O. Horger, III, M.D., Victor Del Bene, John Sanders, William B. Pittard, M.D., Roger Newman, M.D., Harold Bivins, M.D., and Melesia Henry, R.N., personally and in their official capacities.

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Petitioners, ten women whose urine was searched for evidence of drug use when they sought obstetrical care at the Medical University of South Carolina ("MUSC") under a policy designed to gather evidence of criminal activity, respectfully pray that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Fourth Circuit entered on July 13, 1999, to the extent that it denied petitioners' appeal of their claim that the drug testing violated their rights under the Fourth Amendment to the United States Constitution.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 186 F.3d 469. The opinion is set forth in the Appendix (App. 3). The only written opinion of the United States District Court for the District of South Carolina is unreported and is set forth in the Appendix (App. 36).

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was entered on July 13, 1999. A petition for rehearing en banc was denied by an 8-5 vote on September 2, 1999. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. U.S. Const. amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

I. Introduction

Petitioners, nine African-American women and one white woman, brought this action under 42 U.S.C. § 1983 challenging Respondents' policy of warrantless and non-consensual drug testing for criminal investigatory purposes ("the Search Policy") of a virtually all-black group of indigent pregnant women who sought obstetrical care at MUSC, the public hospital located in Charleston, South Carolina.[1] The Search Policy was developed and implemented jointly by members of an interagency group consisting of personnel from MUSC, the City of Charleston Police Department ("CCPD"), and the Charleston County Solicitor's Office,[2] and applied only at the one hospital in Charleston whose patient population was predominantly African-American. An "initial and continuing focus of the Search Policy" was on arrest and prosecution of the targeted group, *Ferguson v. City of Charleston,* 186 F.3d 469, 484 (4th Cir. 1999) (Blake, J., dissenting); search results were routinely used to arrest and prosecute women who tested positive for cocaine and, in some cases, the threat of arrest and prosecution was used as a mechanism to coerce women into drug treatment programs, which Respondents knew to be inadequate.

II. The Search Policy was Designed and Implemented to Gather Evidence to Prosecute the Petitioners.

The record establishes that the Search Policy was designed and implemented to collect evidence in support of criminal investigations. Indeed, Defendant Shirley Brown, R.N. ("Nurse Brown"), a case manager in the Obstetrics Department at MUSC, heard a report about arrests of pregnant women under the South Carolina child abuse statute for drug use during pregnancy. Nurse Brown mentioned the report and the possibility of participating in

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[1] Jurisdiction over this action was proper in the district court pursuant to 28 U.S.C. §§ 1331 and 1343(a).

[2] In South Carolina, the Solicitor is the local prosecuting attorney.

such a program to MUSC's General Counsel Joe Good when she ran into him on her way into the Hospital. Brown Tr. at 4:10-5:17 (App. 76-77). As a result of this conversation, on August 23, 1989, Mr. Good wrote to then-Charleston County Solicitor Charles Condon to inquire as follows:

> I read with great interest in Saturday's newspaper accounts of our good friend, the Solicitor for the Thirteenth Judicial Circuit, prosecuting mothers who gave birth to children who tested positive for drugs . . .
>
> Please advise us if your office is anticipating future criminal action and what if *anything our Medical Center needs to do to assist you in this matter.*

PX 2 (App. 67) (emphasis added).[3] On August 31, 1989, Solicitor Condon wrote to Charleston Police Chief Reuben Greenberg to ask him to consider co-chairing with Solicitor Condon a task force consisting of members from MUSC, the Solicitor's Office and the CCPD. The purpose of the task force was "to consider possible prosecution of the mothers of drug affected babies. . . ." PX 6 (App. 69).

As a result, a joint interagency task force was formed, consisting of members from MUSC, the Solicitor's Office and CCPD. Trial Tr. 12/17/96 at 17:18 – 20:24, 5:13-16 (Condon),[4] Sanders Tr. 102:3 – 103:14 (App. 105-106); Newman Tr. 180:14-18 (App. 93); Cornely Tr. 321:25 – 322:7 (App. 91); Trial Tr. 12/17/96 at 5:13-16 (Condon); *see also, e.g.*, PX 6 (App. 69-71). The Search Policy was first memorialized by law enforcement

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[3] Plaintiffs" Exhibits will be cited as "PX –"; Joint Exhibits as "JX –." When included in the Appendix to this Petition, citations also indicate the page of the Appendix on which the Exhibit appears as "App. –"

[4] Citations to the trial transcript appear as "Trial Tr." with the date, page and line numbers, and witness's name following, unless the cited portions of the transcript are contained in the Appendix to this Petition. In the latter case, citations are to the witness's name, page and line number and page of the Appendix on which the cited transcript appears.

personnel, not MUSC officials, in a series of separate internal memoranda setting forth the guidelines by which women would be selected for testing and tested for drugs and by which a chain of custody for the evidence would be maintained and positive drug tests would be reported to the police.[5] *See, e.g.*, JX 1 (10/12/89 memo written by CCPD Captain) (App. 49); JX 15 (10/17/89 memo written by Solicitor) (App. 64). The 10/12/89 operational guidelines issued by CCPD refer to the positive drug tests as "probable cause" for arrest of the mother. JX 1 (App. 49). A December 19, 1989 letter from Mr. Good explaining the MUSC program states that it was developed by MUSC "*[a]t the suggestion of law enforcement and the solicitor's office. . . ,*" PX 28 (emphasis added) (App. 72), and MUSC personnel were to maintain a formal "chain of custody" for the urine samples collected pursuant to the Search Policy, *see* JX 2 at 2 (App. 54), but not for urine specimens taken for purely medical reasons.

Accordingly, the district court instructed the jury:

> But what makes this case unusual and what brings it within the coverage of the Fourth Amendment is the fact that you have law enforcement and medical service people acting together.
>
> It is the fact that the so-called search, the taking of the urine sample and the testing of it for cocaine, was to be used not only for medical diagnosis, but if it was positive it was also going to be used for police and prosecutorial purposes.

Transcript of Jury Charge 17:22-18:4 (App. 47). As the dissent below wrote:

> Preliminarily, assuming that concern for the health of fetuses being carried by pregnant women using

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[5] When the Search Policy was first implemented, pregnant women who tested positive for cocaine were arrested. Later, pregnant women were offered an opportunity to avoid arrest by participating in "treatment" programs. *Ferguson v. City of Charleston*, No. 2:93-2624-2 (D.S.C. Sept. 29, 1997) (App. 36).

> crack cocaine was a motivating force in the development of the MUSC Search Policy, it nevertheless is clear from the record that an initial and continuing focus of the Search Policy was on the arrest and prosecution of drug-abusing mothers, either before or after they had given birth to the children presumably affected by the cocaine use.

Ferguson, 186 F.3d at 484 (footnote omitted) (Blake, J., dissenting); *id.* ("The prosecutorial purpose of the Search Policy and the substantial involvement of law enforcement officials from the very beginning of its implementation" were clear).[6]

III. The Essential Elements of the Search Policy

Discretionary Criteria for Drug Testing: Collecting urine and performing urine drug screens for cocaine was the first step leading to an arrest under the Search Policy. *See* JX 1 (App. 49); JX 2 (App. 53). However, only a targeted group of women -- those who met certain criteria -- were tested. JX 2 at 1 (App. 53-54); Brown Tr. 28:17 – 30:15 (App. 79-81). These criteria included such discretionary criteria as "inadequate prenatal care," women with "no prenatal care," and women with "[p]reviously known drug or alcohol abuse." *Id.;* Newman Tr. 220-227 (App. 94-104). Eventually, neonatologists were also required to test infants whose mothers met the criteria. Trial Tr. 11/25/96 at 41:2-17 (Patrick). As the Medical Director of the Neonatal Intensive Care Unit testified, testing was not being done for medical reasons,

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[6] This overwhelming contemporaneous documentary evidence, evidence that cannot be altered by failed memory, wishful thinking or political spin, was improperly overlooked by the majority below in favor of self-serving testimony by the Respondents providing post hoc rationalizations for the Search Policy. *Ferguson,* 186 F.3d at 475 n.3. Such self-serving testimony is simply not as reliable as contemporaneous documentary evidence. *See United States v. United States Gypsum*, 333 U.S. 364, 396 (1948) ("[W]here such testimony is in conflict with contemporaneous documents we can give it little weight."); *Burns v. Secretary, Dep't of Health and Human Services*, 3 F.3d 415, 417 (Fed. Cir. 1993) ("Supreme Court counsels that oral testimony in conflict with contemporaneous documentary evidence deserves little weight.").

but solely for purposes of the Search Policy. *Id.* (before the Search Policy, infants were tested for medical reasons, but after the Search Policy was instituted, infants were being tested based solely on the policy criteria); *see also* Chasnoff Tr. 15-17, 42 (App. 84-88, 88-89) (discretionary criteria "medically senseless").

Lack of Search Warrants or Consent to Search: It is undisputed that no search warrants or court orders were obtained before women's urine was collected and searched for drugs. Transcript of Jan. 6, 1997 Jury Charge at 18:15 ("Jury Charge") (App. 48). No specific consent was obtained from the Peitioners for performing a search of their urine, nor were they given any indication that the hospital's confidentiality policy, pursuant to which "medical records and all communication pertaining to [patient] care are . . . treated as confidential," *see* PX 105 (App. 75), did not apply to urine test results. *See, e.g.,* Trial Tr. 11/20/96 at 27 (Griffin); Trial Tr. 11/25/96 at 149 (Powell); Trial Tr. 11/22/96 at 121-22, 139 (Knight); Trial Tr. 11/20/96 at 71 (Singleton).

As the district court correctly held, MUSC's two general consent forms, were "not sufficient consent to warrant a search where the search information is furnished to law enforcement officers." Trial Tr. 1/6/97 at 21 (Jury Charge). Even MUSC's General Counsel Joe Good admitted that he was concerned that the consent forms were inadequate. Trial Tr. 12/16/96 at 202:6-9 (Good). All the other forms related to the Search Policy were given to the woman only *after* she had already been tested for drugs and did not seek either the patient's consent or authorization. For example, "Solicitor's Letters" were only shown to patients after their urine was tested for drugs, i.e., after the search was conducted. *See, e.g.,* Trial Tr. 11/21-22/96 at 50:7-14 (Brown); Trial Tr. 12/10/96 at 279:24-280:7 (Newman); *see also* JXs 5-7 (letters stating "[d]uring your recent examination you tested positive for drugs"). Similarly, Respondents' claim that all patients receiving prenatal care at MUSC were shown the "To Our Patients" letter, JX 10, before they were tested for cocaine, Trial Tr. 11/21-22/96 at 199-202 (Brown), Trial Tr. 12/10/96 at 242-243 (Newman), is belied by the letter itself. JX 10 (stating that if "we *continue* to detect evidence of drug abuse") (emphasis added).

Nursing notes for the only plaintiff whose medical record indicates that she was shown this document at all confirm this. PX 280 at BRO-WN-1415 (noting that Plaintiff Pamela Pear was "given letter from the Dept. of [ob/gyn]" *after* testing positive).

Unauthorized Disclosure of Medical Information: Positive results for cocaine were recorded in the patient's medical chart, as well as on Rolodex cards that Nurse Brown kept in her own office. Trial Tr. 11/21/96 at 59:6-15 (Brown). She provided this information to the Solicitor's Office and, in some circumstances, to the CCPD; Solicitor's Office employees actually had access to the Rolodex and the files in Nurse Brown's office. Trial Tr. 11/21-22/96 at 60:7 – 61:18 (Brown); Trial Tr. 12/10/96 at 193 (Newman); Trial Tr. 12/6/96 at 296:21 – 297:1 (Legare); Trial Tr. 12/16/96 at 216:25 – 217:18 (Good); JX 1 at 2. Neither the Solicitor's Office nor the CCPD had a search warrant, subpoena or court order for medical information it obtained in this manner. Trial Tr. 12/6/96 at 312:25-313:18 (Legare). Moreover, a copy of the patient's discharge summary, containing other confidential medical information such as the patient's medical history, incidence of sexually transmitted diseases, sterilization procedures done while in the hospital, and HIV status, was disclosed to the CCPD officer who came to the hospital to arrest the patient. Trial Tr. 12/6/96 at 217:6-218:6 (Good).

Patients testing positive were also tracked as part of the Suspected Child Abuse and Neglect ("SCAN") meetings at which personnel from the hospital, the Department of Social Services, the Solicitor's Office, and CCPD discussed suspected child abuse. Confidential medical information on the patients to be discussed, such as HIV status and information on tubal ligations, was sent to all members of the SCAN team, including personnel from the Solicitor's Office and CCPD. Trial Tr. 12/9/96 at 125-126 (Hildebrand); PX 228-E; PX 178. Information on each of the Petitioners was disclosed without their consent and without a warrant.

Grounds for Arrest: Under the Search Policy, women who tested positive for cocaine could be arrested or threatened with arrest on the basis of their urine tests for the crimes of possession of drugs, child neglect, or distribution of drugs to a person under

eighteen, depending upon the point in pregnancy at which their cocaine use was discovered.[7] JX 2 at 11 (App. 62-63). The CCPD had never before applied these statutes to address a pregnant woman's drug use, Trial Tr. 11/26/96 at 13:19-25 (Roberts), nor was any male patient ever arrested by CCPD and charged with drug possession based solely on a positive urine drug screen. *Id.* at 50:6-13. The Search Policy applied at all stages of pregnancy, both before and after fetal viability. *See, e.g.*, JX 2 at 9-12 (App. 60-63). Indeed, plaintiff Theresa Joseph was confronted by Nurse Brown and threatened under the Search Policy when she was only sixteen weeks pregnant. PX 277.

Arrests: As Respondents admit, from October 1989 until at least January 1990, women who tested positive for cocaine at the time they gave birth were arrested based on that single positive drug test. *See, e.g.*, JX 3. Nurse Brown would call CCPD, file a complaint, inform them when a patient who had tested positive was about to leave the hospital and help coordinate the woman's in-hospital arrest. Trial Tr. 11/21-22/96 at 90-91 (Brown); Trial Tr. 11/26/96 at 23-24 (Roberts). These women received no referral for drug treatment and no opportunity to obtain treatment as an "alternative" to arrest. Trial Tr. 11/21-22/96 at 37-40 (Brown); *see also, e.g.*, Trial Tr. 11/25/96 at 152:2-5 (Powell) ("And I asked, please, what could I do to stop this or could you help me, I mean, because, you know, what is going on? And then she just said you will be locked up.").[8] Even after these women were arrested, no one associated with the Search Policy provided them with any information about treatment.[9]

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[7] *See* S.C. Code Ann. § 44-53-370 (possession of cocaine misdemeanor carries a maximum sentence of two years for first offense); S.C. Code Ann. § 20-7-50 (criminal child neglect felony carries maximum penalty of ten years); S.C. Code Ann. § 44-53-440 (distribution to persons under eighteen carries maximum sentence of twenty years).

[8] Medical records indicate that Ms. Powell repeatedly requested help in obtaining drug treatment. PX 281, 01-M-12-13 (patient "re-emphasizes her desire for drug treatment"); *id.*, 01-M-13 (patient "desires to be free of addiction to cocaine "and "was accepting of information").

[9] Although defendant Condon insisted at trial that the Search Policy was always intended to provide "amnesty," *see generally* Trial Tr. 12/17/96

Women subject to arrest were, in some instances, denied the opportunity to change out of their hospital gowns or to make a phone call to family members to make arrangements for care of their children. *E.g.*, Trial Tr. 11/20/96 at 61:11-14, 68:22-24, 69:5-8 (Singleton); Trial Tr. 11/25/96 at 152:2-11; 157:4 (Powell); Trial Tr. 11/22/96 at 124:20 – 125:17 (Knight); Trial Tr. 11/20/96 at 11:9 – 12:4 (Griffin). Some women were arrested while still bleeding, weak and in pain from having just given birth. *E.g.*, Trial Tr. 11/20/96 at 68 - 69:8 (Singleton); Trial Tr. 11/25/96 at 153:7-20, 155:8-16 (Powell) ("I pretty much couldn't move on my own"); Trial Tr. 11/22/96 at 125, 136:10-13 (Knight) (arrested while bleeding heavily vaginally from her first vaginal childbirth; and still vomiting). Some women were put in handcuffs that were attached to a chain that went around their belly. *E.g.*, Trial Tr. 11/20/96 at 9:12-25 (Griffin). Some were also put in leg shackles when they were taken into custody. *E.g.*, Trial Tr. 11/20/96 at 62 (Singleton); Trial Tr. 11/20/96 at 8 – 22 (Griffin); Trial Tr. 11/25/96 at 190:2-6 (Ferguson). A blanket or sheet would be placed over the woman and she would be wheeled out of the hospital to a waiting police car. *E.g.*, Trial Tr. 11/20/96 at 62-64 (Singleton); Trial Tr. 11/25/96 at 154 – 156 (Powell); Trial Tr. 11/20/96 at 10 (Griffin); Trial Tr. 11/22/96 at 126 (Knight).

Pregnant women who tested positive for cocaine during prenatal care visits or hospitalizations before delivery were supposed to be given an opportunity to obtain treatment before they were arrested, JX 2 (App. 53), while those testing positive at delivery were simply arrested. Even some women in the former category, though, like Plaintiff Lori Griffin, were arrested with no offer of a treatment alternative. Trial Tr. 11/20/96 at 10 (Griffin).

(Condon), in August 1989 he described the policy as regarding "the prosecution of the mothers." PX 6 at 1 (App. 69); *see also* Trial Tr. 12/5/96 at 28:1-3 (Horger) (confirming that "amnesty is a term that was never used in any of the initial meetings concerning the policy").

IV. The Search Policy Was Not Effective in Improving Fetal Health.

The Search Policy did not reduce cocaine use, improve pregnancy outcome, or increase the number of women successfully completing drug treatment. Indeed, if the Search Policy were responsible for a decrease in cocaine-exposed infants, one would expect to see an increase in cocaine-exposed infants after the Search Policy was terminated, but no such increase took place. Trial Tr. 11/25/96 at 49:22-50:21 (Patrick). Moreover, Martha Jessup, Associate Professor of Nursing at the University of California at San Francisco, a specialist in the treatment of pregnant women and substance abuse, testified that numerous studies have shown that punitive programs drive women away from prenatal care and treatment programs, and do not improve pregnancy outcomes for either mother or child. Trial Tr. 12/9/96 at 89:11-97:2, 115-118 (Jessup).

V. Procedural Background.

Petitioners filed suit in 1993 for damages and injunctive relief claiming *inter alia* that urine drug tests performed pursuant to the Search Policy constituted warrantless searches in violation of the Fourth Amendment. After a six week trial, the trial court submitted Petitioners' Fourth Amendment claim to the jury which found against the Petitioners. After inviting Petitioners to file a Rule 50(b) motion on the Fourth Amendment claim, the court then denied that motion. Petitioners appealed this claim, as well as three others, to the United States Court of Appeals for the Fourth Circuit which affirmed the Judgment of the trial court by a 2-1 vote. Petitioners' petition for rehearing *en banc* was denied by the court below by an 8-5 vote.

REASONS FOR GRANTING THE WRIT

This case concerns the scope of the "special needs" exception to the warrant and individualized suspicion requirements of the Fourth Amendment. At stake is the continued vitality of fundamental Fourth Amendment protections where government is involved in traditional enforcement of its duly enacted criminal laws pursuant to policies that target alleged law breakers--in this

case pregnant women--for searches as a means of obtaining evidence for arrests and prosecution. The Fourth Circuit held that the warrant and cause requirements of the Fourth Amendment are not applicable where the government can articulate a non-law enforcement rationale for the program or policy, even where the policy implements the state's criminal law by traditional means of searches, arrests and prosecutions. We submit that this radical extension of the "special needs" doctrine is entirely inconsistent with this Court's Fourth Amendment jurisprudence and, if allowed to stand, threatens the very integrity of the Fourth Amendment.

The decision by the Fourth Circuit would permit law enforcement or other governmental officers to engage in searches as a means of gaining evidence for arrests and prosecutions, without a warrant or individualized suspicion, so long as the government can present a health or safety reason for its actions. But nearly every application of the criminal law serves some health or safety purpose. Under the novel theory espoused by the Fourth Circuit any such articulation could be the basis of a claim for the "special needs" exemption. This Court's cases, however, permit "special needs" analysis only where the law enforcement purpose (if any) is clearly secondary or incidental to the non-law enforcement purpose. Thus, except in the case of probationers, this Court has never approved the application of the "special needs" doctrine where the state conducts the search as a direct predicate to arrest and prosecution.

Here, the record plainly establishes that the Search Policy and program was to be directly effectuated by means of the arrest and prosecution of the individuals who were searched. In these circumstances, as a Fourth Amendment issue, it matters not that the state may have had the safety and health of the pregnant mother or the fetus in mind. Once it implements this policy by normal law enforcement means, it must comply with the warrant and cause components of the Fourth Amendment. As the Fifth Circuit stated in *United Teachers v. Orleans Parish School Board*, 142 F.3d 853, 857 (5th Cir. 1998):

> special needs are just that, special, an exception to the command of the Fourth Amendment. It cannot

> be the case that a state's preference for means of detection is enough to waive off the protections of privacy afforded by insisting upon individualized suspicion. It is true that the principles we apply are not absolute in their restraint of government, but it is equally true that they do not kneel to the convenience of government, or allow their teaching to be so lightly slipped past.

I. By Applying the Special Needs Exception to the Discretionary Searches of Persons Conducted in This Case for Law Enforcement Purposes, the Fourth Circuit's Decision Conflicts with the Decisions of This Court.

It is well-settled that a search conducted without a warrant issued upon probable cause, like the urine drug screens at issue in this case, is "*per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (citations omitted); *see also Flippo v. West Virginia*, 120 S. Ct. 7 (1999). It is equally well-settled that urine drug screens are searches of the person governed by the Fourth Amendment. *Chandler v. Miller*, 520 U.S. 305, 313 (1997). The only exception asserted by the Respondents in this case was consent. Accordingly, the district court correctly instructed the jury that the searches here were "unreasonable and in violation of the Constitution of the United States, unless the defendants have shown by the greater weight or preponderance of the evidence that the plaintiffs consented to those searches." Tr. Jury Charge at 18:20-23 (App. 48).

Rather than examining whether the Petitioners actually provided valid consent to the urine drug screens, however, the Fourth Circuit held that these searches were "reasonable" under the "special needs" exception to the warrant and probable cause requirements of the Fourth Amendment, even though the Search Policy was specifically designed to gather evidence to be used against the Petitioners for criminal purposes. *See supra* at 2-4. The court below ignored that the Search Policy expressly served the normal needs of law enforcement by prescribing searches for evidence of crimes and delineating standards for maintaining a

proper chain of custody. The court reasoned that "the public health problems associated with maternal cocaine use created a special need beyond normal law enforcement goals; the method chosen to address that need . . . effectively advanced the public interest; and the intrusion suffered by Appellants was minimal." *Ferguson,* 186 F.3d at 479.

A. The Special Needs Exception Has Never Before Been Applied to a Search Policy Serving the Normal Needs of Law Enforcement.

Application of the exception here conflicts with this Court's decisions, which have repeatedly limited the special needs exception to administrative searches that were designed for other than law enforcement purposes, and could not be implemented by traditional law enforcement means. *See Chandler v. Miller,* 520 U.S. 305, 314 (1997) ("When such 'special needs' – *concerns other than crime detection* – are alleged in justification of a Fourth Amendment instrusion, courts must undertake a context-specific inquiry.") (emphasis added); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 651-53 (1995) (applying exception where results of search available only to school officials); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989) (applying exception where search serves "special governmental needs, *beyond the normal need for law enforcement*") (emphasis added); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 621 & n.5 (1989) ("While [the provision permitting drug testing of railroad personnel] might be read broadly to authorize the release of biological samples to law enforcement authorities, the record does not disclose that it was intended to be, or actually has been so used."); *New Jersey v. T.L.O.*, 469 U.S. 325, 356 (1985) (Brennan, J., concurring in relevant part) (In a search conducted under promulgated regulations, the state may be able to avoid the Fourth Amendment if it can establish a "special governmental interest *beyond the need merely to apprehend lawbreakers.*") (emphasis added).[10]

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[10] This Court looks to four factors to determine whether the special needs exception is applicable to a given search: 1) there must be a truly special need that is not merely symbolic, *see Chandler v. Miller*, 520 U.S. at 322

This Court has stressed that results from the searches in question in the "special needs" cases could not be, or simply were not, used in criminal prosecution. For example, in *Von Raab*, this Court emphasized that the test results in the case could "not be used in a criminal prosecution of the employee without the employee's consent." *Von Raab*, 489 U.S. at 666. Similarly, in *Skinner*, where the respondents had claimed that the test results might be used by the police, *see* 489 U.S. at 621 n.5, the Court noted that nothing in the record indicated that the government would use the testing results for any purpose other than employment purposes. *Id.* at 626 n.7.

Indeed, in none of the "special needs" cases cited by the Fourth Circuit were the results of the searches intended for use in criminal prosecutions.[11] *See, e.g., Von Raab*, 489 U.S. at 666 (applying special needs exception to program of drug testing of certain employees in sensitive positions by United States Customs Service where "test results may not be used in a criminal prosecution of the employee without the employee's consent"); *Acton*, 515 U.S. at 651; *Skinner*, 489 U.S. at 621 n.5 (record did not disclose that results of drug testing of railroad personnel was

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(1997); 2) that need must be beyond the normal need for law enforcement, *see, e.g., Von Raab*, 489 U.S. at 665; 3) the need must make the warrant requirement impracticable, *see, e.g., Skinner*, 489 U.S. at 624; and 4) and the need must make the probable cause requirement impracticable, *see, e.g., id.* at 631.

[11] In only one case has this Court sanctioned the application of the special needs exception for law enforcement purposes, and that case involved searches of people with specially limited constitutional protections. In *Griffin v. Wisconsin*, 483 U.S. 868 (1987), this Court allowed a warrantless search by a probation officer at the home of a criminal defendant on probation. The search fell within the "special needs" exception even though the results of the search were used for law enforcement purposes only because probationers have lesser constitutional protections than the public at large. *See id.* at 875 (previous finding of guilt of probationer permitted impingement on privacy that would not be constitutional if applied to the public at large); *see also Penn. Bd. of Parole v. Scott*, 524 U.S. 357, 118 S. Ct. 2014, 2021 (1998) (exclusionary rule inapplicable in parole revocation proceedings); *Ferguson,* 186 F.3d at 486 (Blake, J., dissenting). Although a "special needs" case, *Griffin* is limited to the special circumstance of those with limited constitutional protections, a situation clearly not present here.

"intended to be, or actually has been, [released to law enforcement authorities]"); *T.L.O.*, 469 U.S. 325 (investigative activities of school officials); *Yin v. State of California*, 95 F.3d 864, 869, 873 (9th Cir. 1996) (state employee required to submit to medical examination solely to determine her ability to perform normal work duties); *Wildauer v. Frederick County*, 993 F.2d 369, 372 (4th Cir. 1993) ("investigative home visits are not subject to the same scrutiny as searches in the criminal context"); *Dimeo v. Griffin*, 943 F.2d 679, 685 (7th Cir. 1990) (en banc) (jockeys and other participants in horse racing required to undergo random drug tests as condition of occupational licensure); *see also United Teachers*, 142 F.3d at 856 ("There are exceptions based on 'special needs, beyond the normal need for law enforcement.'") (quoting *Skinner*, 489 U.S. at 619). *See generally Ferguson v. City of Charleston*, 186 F.3d at 486-87 (Blake, J., dissenting) (discussing cases).

B. The Exceptions to the Warrant and Probable Cause Requirements for Law Enforcement Searches Relied on By the Court Below Have No Application Here.

The era is past in which pregnant women were regarded as peculiarly subject to the authority of the state because of their status as child-bearers. *See generally Planned Parenthood v. Casey*, 505 U.S. 833, 896-98 (1992); *id.* at 896 ("The effect of state regulation [with respect to a woman's pregnancy] on a woman's protected liberty is doubly deserving of scrutiny . . . , as the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman.").[12] Yet the Fourth Circuit's reliance on *Michigan Dep't of State Police v. Sitz*, 496 U.S. at 444, and *Griffin v. Wisconsin*, 483 U.S. 868 (1987), relegates pregnant women in their doctors'

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[12] *See also Casey*, 505 U.S. at 898 ("The husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife. The contrary view leads to consequences reminiscent of the common law . . . if the husband's interest in the fetus' safety is a sufficient predicate for state regulation, the State could reasonably conclude that pregnant wives should notify their husbands before drinking alcohol or smoking.").

offices to a status comparable to the one occupied by convicted criminals on probation, leaving them with less protection under the Fourth Amendment than this Court provides motorists in their cars.

As the court below notes, this Court has applied a balancing test to uphold the constitutionality of government checkpoints set up to detect drunken drivers, *Sitz*, 496 U.S. at 444, and illegal immigrants, *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). However, the Fourth Circuit's reliance on these cases ignores the many distinctions between checkpoint searches and the search at issue here.

This Court has stressed that the checkpoint cases involved no more than an "initial stop . . . and the associated preliminary questioning and observation by checkpoint officers." *Sitz*, 496 U.S. at 450-51. Indeed, the very randomness and universality of these checkpoint seizures is what saves them by preventing their abuse. As this Court cautioned in distinguishing between such checkpoint "seizures" in which drivers are observed by officers who stand outside the stopped car, and situations, such as those at issue here, where the personal property or body of an individual itself is searched: "[D]etention of particular motorists for more extensive . . . testing may require satisfaction of an individualized suspicion standard." *Sitz*, 496 U.S. at 451 (citation omitted). Thus, under the Fourth Circuit's ruling, which guts the individualized suspicion standard for low-income pregnant women seeking prenatal care late in pregnancy (and who thus fall within the Search Policy's dragnet), pregnant women have fewer rights than motorists.

Similarly, at least since *United States v. Ortiz*, 422 U.S. 891 (1975), it has been clear that the limited exception to the individualized suspicion requirement that justifies temporary seizures of motorists at properly operated checkpoints does not serve also to allow searches of one's person or even one's effects. As the Court held in *Ortiz*, "at checkpoint stops removed from the border and its functional equivalents, officers may not search private vehicles without consent or probable cause." *Ortiz*, 422 U.S. at 896-97; *see also Martinez-Fuerte*, 428 U.S. at 567 (after brief questioning at illegal immigrant checkpoint, any further invasive conduct must "be based on consent or probable cause")

(citations omitted); *Wilkinson v. Forst*, 832 F.2d 1330 (2d Cir. 1987) (pat-down searches of known KKK members entering rally unconstitutional despite record of violent behavior). Under the Fourth Circuit's ruling, though, the body of a pregnant woman can be searched for law enforcement purposes in the privacy of her doctor's office without consent or probable cause.

Furthermore, the Search Policy's allowance for discretion takes it completely outside the bounds of *Sitz* and the other checkpoint cases relied upon by the Fourth Circuit, because the special needs exception only applies to policies authorizing non-discretionary searches. *Ferguson*, 186 F.3d at 479 ("cases upholding warrantless administrative searches clearly establish that these rules require certainty, regularity, and neutrality in the conduct of the searches.") (quoting *Turner v. Dammon*, 848 F.2d 440, 446-47 (4th Cir. 1988)). As this Court noted in *Sitz*, "standardless and unconstrained discretion is the evil the Court has discerned." *Sitz*, 496 U.S. at 454 (citing *Delaware v. Prouse*, 440 U.S. 648, 661 (1979)); *see also T.L.O.*, 469 U.S. at 342 n.8; *Prouse*, 440 U.S. at 654-55. As this Court held in a case involving an attempted search of a student's backpack by school officials, "a search conducted in the absence of individualized suspicion would be reasonable only in a narrow class of cases," where, *inter alia*, "'safeguards are available to assure that the individual's reasonable expectation of privacy is not subject to the discretion of the official in the field.'" *DesRoches v. Caprio*, 156 F.3d 571, 575 (4th Cir. 1998) (quoting *T.L.O.*, 469 U.S. at 342 n.8).

But the court of appeals erred in asserting that the Search Policy at issue here involved such neutrality. Although, as the panel notes, "the urine drug screens were conducted whenever one of the criteria for testing was met; a treating physician had no discretion to decline to order a urine test under the Search Policy," *Ferguson*, 186 F.3d at 479, the problem here was that the criteria themselves included such discretionary criteria as "inadequate prenatal care," women with "no prenatal care," and women with "[p]reviously known drug or alcohol abuse." JX 2 at MUSC-763; Trial Tr. 12/10/96 at 220-227 (Newman); JX 2 at MUSC-763; Trial Tr. 12/5/96 at 9-18 (Horger); Trial Tr. 11/21-22/96 at 28:17 – 30:15 (Brown). As Plaintiffs' expert Ira Chasnoff, M.D., testified,

such "medically senseless" criteria, Trial Tr. 12/4/96 at 15-17, 42 (Chasnoff), invited discriminatory testing because selecting which patients to test based on lack of prenatal care constituted a proxy for selecting poor African-American patients,[13] and because giving physicians the discretion to determine whom to test would produce a racially disproportionate impact. Trial Tr. 12/4/96 at 15-17, 42 (Chasnoff).[14]

The Fourth Circuit's reliance on *Griffin v. Wisconsin*, 483 U.S. 868 (1987), is similarly misplaced for the reasons noted above: probationers have lesser constitutional protections than the public at large. *See Griffin*, 483 U.S. at 875 (previous finding of guilt of probationer permitted impingement on privacy that would not be constitutional if applied to the public at large).[15] *See infra* at 14 n. 11. Under the Fourth Circuit's ruling, pregnant women are improperly placed in a lower status than the public at large, and are relegated to the same level of constitutional protections as parolees, probationers and prisoners.

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[13] Numerous studies show that policies concerning drug use among pregnant women are implemented in a racially biased manner. Trial Tr. 12/4/96 at 17-20 (Chasnoff); *see also* Ira Chasnoff, M.D., Harvey J. Landress, A.C.S.W., Mark E. Barrett, Ph.D., "The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida," 322 New Eng. J. of Med. 1202 (Apr. 26, 1990).

[14] As the court of appeals found, the Search Policy did indeed have a racially discriminatory impact on African-American women. *Ferguson*, 186 F.3d at 481. Moreover, after implementation of the new subjective criteria for testing, the proportion of African American women tested rose by an amount equal to approximately 10.5 standard deviations. Trial Tr. 11/25/96 at 139-141 (Shapiro).

[15] *See also United States v. Jarrad*, 754 F.2d 1451, 1453 (9th Cir. 1985) (warrantless parole search does not run afoul of the Fourth Amendment when the parole officer reasonably believes such search is necessary in the performance of his duties) (citing *Latta v. Fitzharris*, 521 F.2d 246 (9th Cir. 1975) (en banc)).

C. The "Special Needs" Exception Does Not Apply Here Because the Need Articulated is Merely "Symbolic."

The court below also erred by applying the "special needs" exception without considering that the claimed non-law enforcement need in this case was purely "symbolic," not special. *See Chandler v. Miller*, 520 U.S. 305, 322 (1997). In *Chandler*, this Court found the drug-testing scheme for candidates for elected office in Georgia unconstitutional because "[t]he need revealed, in short, is symbolic, not 'special,' as that term draws meaning from our case law." *Id.; see also Von Raab*, 489 U.S. at 681 (Scalia, J., dissenting) (government had not shown that the need to test customs employees for drugs was special because "neither frequency of use nor connection to harm is demonstrated or even likely."); *id.* (the testing program was "a kind of immolation of privacy and human dignity in symbolic opposition to drug use.")

The courts of appeals have relied on *Chandler* to determine whether the need is "special" and not "symbolic." For example, in *United Teachers of New Orleans v. Orleans Parish School Board*, 142 F.3d 853, 856-57 (5th Cir. 1998), the Fifth Circuit held that a drug testing program for teachers involved in workplace accidents was not based on a special need because the state interest was not well-defined or based on "demonstrated realities":

> . . . [I]t is self-evident that we cannot rest upon the rhetoric of the drug wars. As destructive as drugs are and as precious are the charges of our teachers, special needs must rest on demonstrated realities. Failure to do so leaves the effort to justify this testing as responsive to drugs in public schools as a "kind of immolation of privacy and human dignity in symbolic opposition to drug use," that troubled Justice Scalia in *Von Raab*.

Id. at 857 (citation omitted) (rules on testing both under- and overinclusive). Similarly, in *19 Solid Waste Department Mechanics v. City of Albuquerque*, 156 F.3d 1068, 1072-75 (10th Cir. 1998), the Tenth Circuit held that a drug testing program for garbage truck mechanics was not based on a special need because

the program "lacks a real capacity to address drug use in the workplace." *Id.* at 1074.

In this case as well, the Search Policy was similarly under and over inclusive, and "lack[ed] a real capacity to address drug use" by pregnant women. The Respondents could not establish a sufficient nexus between the testing program and their claimed purpose of promoting healthy pregnancies, because the testing criteria used here was both under- and overinclusive. *See United Teachers*, 142 F.3d at 856-57. It was underinclusive because women were only reported for positive cocaine tests and not for the numerous other harmful substances also tested. It was overinclusive because it tested all women who had "inadequate prenatal care," despite the fact that this is more of a marker for poverty and racial status than it is for substance abuse. *See id.* (striking Search Policy of testing teachers who have been injured because of "insufficient nexus between suffering an injury at work and drug impairment").

Thus, because the decision of the court below conflicts with the decisions of this Court on the important question of the applicability of the special needs exception, the petition should be granted. Sup. Ct. R. 10(c).

II. The Opinion of the Court Below Decides an Important Federal Question That Has Not Been, but Should Be Decided by This Court and Conflicts with Decisions from Several United States Courts of Appeals, All of Which Have Rejected Application of the Special Needs Exception to Search Policies with a Dual Purpose.

As this Court stated in *Skinner*:

> We leave for another day the question whether routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, or otherwise impugn the administrative nature of the FRA's program.

Skinner, 489 U.S. at 621 n.5; *see also T.L.O.*, 469 U.S. at 341 n.7 ("This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question"). This case squarely presents the important federal question left open by *Skinner* and *T.L.O.*.

To the extent that some "special" need beyond the normal needs of law enforcement was even slightly served by the Search Policy at issue here,[16] *but see supra* at 18-20, this case presents the important question, "le[ft] for another day" in *Skinner*, of "whether routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, or otherwise impugn the administrative nature" of the Search Policy. This question, of whether a search policy serving both the normal needs of law enforcement, but *also* serving minimally some other "special need," may be exempt from the Fourth Amendment's requirements of warrants and individualized suspicion, is "an important question of federal law that has not been, but should be, settled by this Court." S. Ct. Rule 10(c).

Although this Court has not addressed this question in its "special needs" cases, this Court's discussion of the issue of overlapping law enforcement and administrative purposes in cases concerning administrative searches is illuminating here. For example, in *Michigan v. Clifford*, 464 U.S. 287 (1984), the Court evaluated a search of a home in the aftermath of a fire, distinguishing between the search to determine the cause of the fire and a second separate search to gather evidence of criminal arson. *Id. at 294*. The Court held that, unless a search was justified by exigent circumstances or consent, even a search to determine the cause of the fire required a warrant, albeit an administrative one.

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[16] At best, the Search Policy here was designed with a dual purpose: to improve the health of fetuses and to collect evidence for criminal prosecutions. *Ferguson*, 186 F.3d at 484 (Blake, J., dissenting) (noting that although the health of fetuses "was a motivating force in the development of the MUSC policy, it nevertheless is clear from the record that an initial and continuing focus of the policy was on the arrest and prosecution of drug-abusing mothers . . . ").

Id. Moreover, noting that "the object of the search determine[d] the type of warrant required,"*id.*, the Court stated:

> If the *primary* object is to determine the cause and origin of a recent fire, an administrative warrant will suffice. . . . If the *primary* object of the search is to gather evidence of a criminal activity, a criminal search warrant may be obtained only on a showing of probable cause to believe that relevant evidence will be found in the place to be searched.

Id. at 294 (emphasis added).

On the other hand, in the context of administrative inspections of a "pervasively regulated business," where the privacy interests of property owners are reduced, *see New York v. Burger*, 482 U.S. 691 (1987), this Court approved an administrative search without a warrant, even where the search might also uncover evidence of crimes. *Id.* at 716. The Court stressed that the administrative scheme in question was not being used as a "'pretext' to enable law enforcement authorities to gather evidence of penal law violations," *id.* at 716 n.27, indicating that if the administrative purpose is dominant and the law enforcement goals are merely incidental to the regulatory goals, the search should be analyzed under the administrative search exception. *Id.* at 716-17. The court below, however, did not apply even this lower level of review to searches of the bodies of pregnant women, examining neither whether the primary object of the search was to gather evidence of criminal activity, nor whether the drug testing scheme was a "pretext" to enable authorities to gather evidence of penal law violations. Thus, under the Fourth Circuit's approach, application of the "special needs" exception to a dual purpose case such as this one, where the law enforcement goals of the search policy are so extensive, does not even provide the level of protection provided in *Clifford* and *Burger*.

Indeed, no other court has applied the "special needs" exception in circumstances similar to this case. Application of the "special needs" exception in the lower courts reveals two distinct categories: cases in which there is no law enforcement purpose whatsoever, and cases in which the person being searched has

reduced constitutional rights because of his or her status as a parolee, probationer or prisoner, where there is a special need unrelated to law enforcement coupled with an overlapping law enforcement purpose. The courts of appeals have applied the "special needs" exception only in these two categories.

In the first category, the courts of appeals have allowed drug testing in various fields of employment and in a variety of school situations, following this Court's lead in *Skinner*, 489 U.S. 602, *Von Raab*, 489 U.S. 656, *O'Connor v. Ortega*, 480 U.S. 709 (1987), *Acton*, 515 U.S. 646, and *T.L.O.*, 469 U.S. 325. In each of these cases a key factor in applying the "special needs" exception was that there was no law enforcement use of the drug testing results. *See, e.g.*, *Aubrey v. School Board of Lafayette Parish*, 148 F.3d 559 (5th Cir. 1998) (school custodian); *Todd v. Rush County Schools*, 133 F.3d 984 (7th Cir. 1998) (students involved in extra-curricular activities); *Stigile v. Clinton*, 110 F.3d 801 (D.C. Cir. 1997) (Office of Management and Budget employees); *International Brotherhood of Electrical Workers v. United States Nuclear Regulatory Commission*, 966 F.2d 521 (9th Cir. 1992) (clerical, warehouse, and maintenance employees at a nuclear power plant); *Willner v. Thornburgh*, 928 F.2d 1185 (D.C. Cir. 1991) (applicants for Department of Justice positions); *Penny v. Kennedy*, 915 F.2d 1065 (6th Cir. 1990) (fire fighters and police officers); *Bluestein v. Department of Transportation*, 908 F.2d 451 (9th Cir. 1990) (various categories of employees in the private commercial aviation industry); *Transport Workers' Union v. Southeastern Pennsylvania Transportation Authority*, 884 F.2d 709 (3d Cir. 1988) (safety sensitive transit authority employees); *Thomson v. Marsh*, 884 F.2d 113 (4th Cir. 1989) (civilian employees at chemical weapons plant); *Schaill v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1988) (student athletes).

Second, following *Griffin*, many courts have applied the "special needs" exception to cases involving searches of probationers, parolees, and prisoners, all people with reduced constitutional protections because of a prior criminal conviction. *See* 483 U.S. at 873-74 (search of a probationers' residence); *see, e.g.*, *Roe v. Bosco*, 193 F.3d 72 (2d Cir. 1999) (convicted sex

offenders); *United States v. Payne*, 181 F.3d 781 (6th Cir. 1999) (parolee); *United States v. Vincent*, 167 F.3d 428 (8th Cir. 1999) (terms of probation); *United States v. Jones*, 152 F.3d 680 (7th Cir. 1998) (parolee); *United States v. Ward*, 131 F.3d 335 (3d Cir. 1997) (person convicted of sexual assault); *Rise v. Oregon*, 59 F.3d 1556 (9th Cir. 1995) (persons convicted of murder or any sexual offense); *United States v. Lewis*, 71 F.3d 358 (10th Cir. 1995) (parolee); *Shea v. Smith*, 966 F.2d 127 (3d Cir. 1992) (probationer); *United States v. Hill*, 967 F.2d 902 (3d Cir. 1992) (parolee); *United States v. Giannetta*, 909 F.2d 571 (1st Cir. 1990) (probationer); *United States v. Cardona*, 903 F.2d 60 (1st Cir. 1990) (parolee); *Dunn v. White*, 880 F.2d 1188 (10th Cir. 1989) (prisoner); *United States v. Richardson*, 849 F.2d 439 (9th Cir. 1988) (probationer). Like this Court in *Griffin*, 483 U.S. at 874 (probationers "do not enjoy 'the absolute liberty to which every citizen is entitled . . .'") (quoting *Morissey v. Brewer*, 408 U.S. 471, 480 (1972)), the courts in these cases stressed the limited constitutional protections available to those convicted of a crime. *See, e.g.*, *Rise*, 59 F.3d at 1560 ("Once a person is convicted of one of the felonies included as predicate offenses . . . his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from blood sampling."); *Hill*, 967 F.2d at 909 ("In fact, parole may be an even more severe restriction on liberty because the parolee has already been adjudged in need of incarceration."); *Shea*, 966 F.2d at 131 (reciting *Griffin*'s analysis relying on the fact that "probationers have a diminished expectation of privacy by virtue of their status").

Beyond these two classes of warrantless searches not based on probable cause, however, the courts of appeals that have dealt with this issue, with the exception of the Fourth Circuit in this case, have uniformly found that searches with a law enforcement purpose not involving persons in prison or on parole or probation are outside the "special needs" exception, even though the government claims that an important, and even compelling, non-law-enforcement purpose is served by the policy at issue. For example, in *Franz v. Lytle*, 997 F.2d 784 (10th Cir. 1993), the court rejected application of the "special needs" exception to a

police officer's search of a child's vaginal area and of the child's parent's home. *Id.* at 790-91. While recognizing the importance of "society's interest in protecting young children from abuse and neglect," *id.* at 788, the court distinguished between a search by a social worker where the "principal focus is the welfare of the child," and the search by the police officer where the "focus was not so much on the child as it was on the potential criminal culpability of her parents." *Id.* at 791.

Similarly, in *United Teachers*, the Fifth Circuit rejected application of the special needs exception to a policy of drug testing the urine of teachers injured on the job despite recognizing the state's important interest in responding to the presence of drugs in the public schools. *United Teachers*, 142 F.3d at 856-57. There, the court held that "[t]he two parish school boards have offered no legal justification for insisting upon drug testing urine [of teachers injured on the job] without a showing of individualized suspicion of wrongdoing in a given case, *certainly nothing beyond the ordinary needs of law enforcement.*" *Id.* (emphasis added).

Moreover, in *Nelson v. City of Irvine*, 143 F.3d 1196, 1203 (9th Cir. 1998), the Ninth Circuit rejected application of the special needs exception to blood tests conducted on DUI arrestees, despite the state's interest in ensuring the safety of public roadways. In *Nelson*, the court noted that in *Skinner*, this Court cited as examples of "special needs" cases, "searches of probationers' homes, searches of the premises of highly regulated businesses, work-related searches of employees' desks and offices, searches of students' property by school officials and body cavity searches of prison inmates." *Id.* The court held that "[i]t is untenable to equate the police DUI traffic stops with the pervasively regulated environments where special needs can justify even suspicionless drug testing," *Id. See also United States v. Colyer*, 878 F.2d 469, 478 (D.C. Cir. 1989) (rejecting application of special needs test to search for drugs by DEA agent and his drug sniffing dog, the court noted that "[i]n no case has the Supreme Court indicated that a search for evidence qua evidence might qualify as a 'special need' that would warrant reasonableness balancing. Common sense suggests that it is not.").

Certiorari is, therefore, warranted under Supreme Court Rules 10(a) and 10(c) because application of the "special needs" exception to a policy serving both law-enforcement and non-law enforcement purposes raises an important issue of federal law as yet undecided by this Court and conflicts with decisions from four other courts of appeals.

III. Assuming, *Arguendo*, that the "Special Needs" Exception Does Apply Here, the Court Below Erred By Applying the Balancing Test Used in "Checkpoint Seizure" Cases.

As this Court has held, in "special needs" cases, "it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." *Von Raab*, 489 U.S. at 665-66. Assuming, *arguendo*, that the need in this case is indeed "special" and is sufficiently "beyond the normal need of law enforcement," the Fourth Circuit ignores this important balancing step that is necessary under this Court's precedent before concluding that the "special needs" exception actually applies. Instead of analyzing whether the warrant and probable cause requirements were impracticable on the facts before it, the Fourth Circuit leapfrogged directly to the application of the balancing test applied in checkpoint "seizure" cases which requires "consideration of the governmental interest prompting the invasion; the effectiveness of the intrusion, *i.e.*, the degree to which the intrusion reasonably is thought to advance the governmental interest; and the magnitude of the intrusion upon the individuals affected, from both a subjective and objective standpoint." *See Ferguson*, 186 F.3d at 476.[17] Thus, the court below did not consider at all whether it would have been impractical to require a warrant or some level of individualized suspicion in this context.

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[17] Neither case cited by the majority, *see Ferguson*, 186 F.3d at 476, to support its use of this test is applicable here. The *Sitz* checkpoint "seizure" test is inapposite in this discretionary program for the reasons outlined above, and *DesRoches v. Caprio*, 156 F.3d 571, 574 (4th Cir. 1998), does not appear to apply this test at all.

Second, even in applying the *Sitz* balancing test the court below erred in two additional ways. For the reasons outlined above, there was not sufficient evidence that the Search Policy was "effective." *Supra* at 9-10. As the dissent notes, *Ferguson*, 186 F.3d at 488, seven of the ten Petitioners were arrested *after giving birth*, often directly from their hospital beds, wearing nothing but hospital gowns, rather than during the prenatal period, when intervention according to the Respondents was crucial. So the searches at issue here were effective in identifying women to arrest, but not in insuring a drug-free pregnancy. Nor did Respondents present any empirical data on the effectiveness of the targeted testing program in achieving its goal. *Cf. Sitz*, 496 U.S. at 454-55 (noting importance of the empirical data on effectiveness present in that case).

Moreover, contrary to the finding of the court below, *see Ferguson*, 186 F.3d at 479, nothing about the intrusiveness of the searches here was "minimal." The court below relies on the analysis in *Sitz* to evaluate the intrusiveness of the urine drug tests here, using the "'duration of the seizure and the intensity of the investigation'" to measure "the extent to which the method chosen minimizes or enhances fear and surprise on the part of those searched or detained." *Id.* (quoting *Sitz*, at 452). But this case does not involve such a "minimal" intrusion as a quick glance into a car at a checkpoint on a highway. *See Sitz*, 496 U.S. at 452-53 (where signs warning of checkpoint stops allow person to avoid the stop, result is "appreciably less" "subjective intrusion" than even "roving patrols"). Rather, the Petitioners' *bodies* were searched. Such a nonconsensual search of a person's body for evidence of crime is among the most intrusive searches imaginable. *See Rochin v. California*, 342 U.S. 165, 210 (1952).

Indeed, this Court has established that drug testing invades personal privacy in a fashion that brings the requirements of the Fourth Amendment to bear in full force. *New Jersey v. T.L.O.*, 469 U.S. at 337 ("[w]e have recognized that even a limited search of the person is a substantial invasion of privacy") (citing *Terry v. Ohio*, 392 U.S. 1, 24-25 (1967)). As a result, it has approved suspicionless drug testing as "reasonable" only in a narrowly circumscribed set of circumstances. In *Skinner* and *Von Raab*, for

example, the Court upheld carefully constrained programs that applied only to a limited number of government employees. By contrast, the program at issue here – if upheld – puts at risk the privacy of every pregnant woman in South Carolina. In effect, it decrees that women, by becoming pregnant and seeking medical attention, place themselves in the same category as minor students in the custody of the public schools: a "custodial and tutelary" relationship "permitting a degree of supervision and control that could not be exercised over free adults." *Acton*, 515 U.S. at 655.

This result is radically at odds with the assumptions that have historically attended medical treatment of adults, in which the obligation of the medical profession is to guard the confidences of patients as a "sacred trust." And it is irreconcilable with the teaching of this Court in *Planned Parenthood v. Casey* that it is unconstitutional to treat pregnant women as dependents requiring the tutelage of the state. *Planned Parenthood*, 505 U.S. at 895 (contrasting the "quite reasonable assumption that minors will benefit from consultation with their parents" with the constitutional impermissibility of adopting "parallel assumption about adult women").

Nor does the fact that the urine drug tests took place as part of a medical examination minimize the intrusiveness of the search.[18] Indeed, the fact that the Petitioners had no idea that their physicians were revealing what the Petitioners believed to be confidential information[19] to law enforcement officers rather than simply using the information for medical purposes only increases the intrusive aspect of the search. Just because one does not know that one is being searched for criminal purposes does not lessen the impact of the invasion. For example, a search of one's home even when one was not there would not be considered minimal, even

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[18] Both cases cited by the court of appeals, *see* 186 F.3d at 479, involved searches for purposes of employment and not for criminal investigation. *See Yin*, 95 F.3d at 869; *Dimeo*, 943 F.2d at 682 (tests for noncriminal purposes); *id.* (distinguishing person who has frequent medical examinations because of illness from person who has them because of a job).

[19] MUSC's Patient Handbook, given to all patients, stated "medical records and all communication pertaining to your care are also treated as confidential." PX 105 (App. 75).

though searching the home when the occupants are not inside would *drastically* minimize "fear and surprise" on the part of those searched. *Cf. Ferguson,* 186 F.3d at 479; *see also id.* at 488 (Blake, J., dissenting).

Therefore, certiorari is also warranted to correct the Fourth Circuit's application of the "special needs" exception as it conflicts with this Court's past decisions. Sup. Ct. R. 10(c).

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that the Court grant their petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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